BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY J. ALLMOND	)	
Claimant	)	
	)	
VS.	)	
	)	
SAMPSON CONSTRUCTION & QHI	)	
Respondent	)	Docket No. 1,055,088
	)	
AND	)	
	)	
TECHNOLOGY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) request review of the June 21, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dale V. Slape, of Wichita, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent.

The ALJ found that the claimant suffered a back injury from an accident arising out of and in the course of his employment with respondent on February 9, 2011, and that respondent had statutory notice of claimant's injury. The ALJ went on to order respondent to furnish claimant with the names of three physicians so claimant could choose one to be his treating physician. Respondent was also ordered to pay the claimant temporary total disability compensation at a rate of $320.16 per week if claimant is taken off work or placed under restrictions that cannot be accommodated.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 5, 2011, Preliminary Hearing and the exhibits; the deposition of the claimant taken June 6, 2011; the deposition of John Wray taken June 6, 2011; the deposition of Cassandra Wray taken June 6, 2011; and the deposition of Chris Sampson taken June 8, 2011, together with the pleadings contained in the administrative file.

ISSUES

Respondent appeals arguing that the claimant did not sustain an injury arising out of and in the course of his employment and that timely notice was not provided of an accident and alleged injury. Therefore, respondent asserts the ALJ's Order should be reversed and claimant denied the requested benefits.

Claimant argues that the greater weight of the evidence supports that he was injured out of and in the course of his employment and he provided timely notice of his injury and, therefore, the ALJ's Order should be affirmed.

The issues for the Board's review are:

(1) Did claimant suffer injury by an accident that arose out of and in the course of his employment with respondent?

(2) Did claimant provide respondent with timely notice of the alleged accident?

FINDINGS OF FACT

Claimant testified that on February 9, 2011, he and his co-worker, Kevin Olden, were trying to dig a pad to pour concrete underneath deck steps in 30 degree weather. Claimant was using a sharpshooter shovel, and when the shovel turned on him, he fell, breaking the stair jack with his back. Claimant testified that he immediately felt pain in his low back at the belt line and laid on the ground for 5 to 10 minutes. Claimant testified that Kevin asked him repeatedly if he was alright and claimant kept saying, no he hurt. Claimant testified that although there were other people on site that day, no one actually witnessed his accident.[1] After a while, claimant got himself up and called Chris Sampson, the owner of the company, and reported what happened. Claimant testified that Mr. Sampson asked if he needed to go home and claimant responded that he really needed to see a doctor and asked where he could go that would be closest. Claimant claims he went to the facility he was directed to, only to be told that they did not deal with workers compensation claims. He was given a list of three different places he could go.

Claimant chose Via Christi on Maple Street, where the front desk attendant searched for Sampson Construction in the computer system. When she did not find it in the system, she told claimant she did not know with which carrier respondent had workers compensation coverage. She then told claimant to call his boss. Claimant tried to contact his boss, Christopher (Chris) Sampson, but could not get him on the phone. While claimant sat waiting for a return call from Chris Sampson, he got a call from Tony

[1] Claimant testified there was another co-worker there when he was injured, named Anthony, but he did not think either Kevin or Anthony actually saw him fall. Neither Kevin nor Anthony testified.

Sampson[2], Chris' father. Tony Sampson told claimant he should have called him rather than Chris, as he would have sent him to his doctor on Rock Road.

After attempts to get medical treatment through respondent failed, claimant, on March 10, 2011, sought treatment at the VA Hospital. Claimant reported to the VA doctor that he had continued to work after the accident because he needed to support his family. The VA doctor recommended that claimant take time off work. Claimant met with Chris Sampson the next day, March 11, 2011, and submitted the doctor's report. The two discussed the situation and came to the conclusion that claimant should be laid off so that his back could take time to heal. Claimant continues to have pain in his back. He has not worked anywhere since he was laid off by respondent.

Claimant admits that he complained about back pain while working for the respondent but contends that he did so no more than anyone else. He testified that when you work in construction for 30 years you are going to have aches and pains. Although claimant admits to prior injuries or problems with his neck (1998 or 1999) and left shoulder (broken clavicle in high school), he denies any prior problems with his low back.

Claimant acknowledged filling out daily time cards for respondent. But when claimant was shown the time card that indicated he did not work on February 9, 2011, claimant said that the time cards counsel presented (Resp. Ex. 3) did not look the same as the ones he filled out and it did not look like his handwriting.

Claimant was deposed again on June 6, 2011, at which time he testified that he began working for respondent on September 7, 2010. Claimant testified that he was injured on February 9, 2011. He did not know why his timecard would indicate he had not worked that day based on the pay stub submitted for the week February 7-13, 2011, because his pay stub for that week shows he worked 21.3 hours. He went on to testify however, that he didn't always get a pay stub with his wages.

Claimant testified that he owed Mr. Sampson for a 1996 Honda motorcycle that he bought at a garage sale that Mr. Sampson's father had. The motorcycle was sold to the claimant for just over $1,000. An agreement was made that claimant would pay the cycle off through his paycheck for an agreed amount every week. Claimant testified that the remainder of the debt owed for the motorcycle was erased when he was laid off and, therefore, he would like the title to the motorcycle.

Chris Sampson, owner/general contractor for Sampson Construction, testified that he became acquainted with the claimant through his friend John Wray and his wife Cassandra, who is claimant's daughter. Chris Sampson testified that Mr. Wray called him and asked if he would hire the claimant, his father-in-law, and he told Mr. Wray that

[2] Tony Sampson is also an owner of respondent.

business was kind of slow at the moment but he would see what he could find for claimant to do. Chris Sampson ended up hiring the claimant at around $12.50 an hour. He testified claimant worked as needed beginning in September 2010 and was paid in cash for a couple of months, and on November 2, 2010, he was hired on as an hourly employee. He testified that claimant started work and worked for the company for approximately four months.

Chris Sampson testified that the claimant started out really well and was a rare asset with his own truck and tools from the construction business (Papa Bear Construction) he had in Arkansas. But within 60 days, claimant started "petering out," showing up every day except for one complaining about his back hurting, going home early, taking time off because of his back pain, and making sure that everyone around knew his back was hurting.

Chris Sampson testified that at no time during claimant's employment with respondent did claimant report a work-related injury. He did, however, on several occasions complain of low back pain to his co-workers, but never to Chris Sampson. He also testified that neither the claimant nor anyone else requested any medical treatment for claimant.

Chris Sampson testified that he tried to accommodate claimant and his bad back by not requiring the claimant to lift anything heavy or do anything strenuous, leaving claimant performing mostly skilled labor. Chris Sampson testified that it got to the point where he would just not have the claimant come in as much, which he claims caused the claimant to become bitter and voice to the rest of the crew that he should just get fired so that he could collect unemployment. Then later claimant would say that he was fine and was just going through some personal stuff at home and he would get back on track. Chris Sampson testified that because claimant was the low man on the totem pole with the company and because his work performance was declining and claimant was complaining of back problems, he took the opportunity to lay claimant off. Through a written agreement, claimant's debt was forgiven, and respondent promised not to dispute any claim for unemployment.

Chris Sampson testified the first time he received a written claim with reference to claimant's alleged injury was in late March when he received a letter from claimant's counsel saying that claimant claimed to have injured himself on February 9, 2011. Respondent argues that according to its time records, claimant did not work on February 9, 2011.

Chris Sampson testified that he does not recall a phone conversation with Cassandra Wray wherein she claimed to have reported to him that her father, the claimant, injured himself at work and requested that respondent provide medical treatment. He testified that he does recall talking with Cassandra about her concern regarding claimant missing work because of his back and hoping that claimant would not get fired because

his paycheck was the only source of income as she and her husband were unemployed at the time. Chris Sampson assured Mrs. Wray that claimant was not going to be fired for staying home for a few days because of back pain. At no time during the conversation was it reported that claimant's back pain was due to a work-related accident.

Chris Sampson testified he was not sure if the time cards as shown in respondent's Exhibit 3 to the preliminary hearing indicate that the weeks ended on February 6 and February 13 or if the weeks started those days. He believed, however, the dates on the time cards indicate the end of the work week, so the February 13, 2011, time card would cover the day claimant alleges he was injured. He went on to state that claimant had only worked one day the week ending February 6, 2011. That week was combined with the week ending February 13, 2011, and during the two-week period, claimant worked and was paid for 21.3 hours, as shown on claimant's pay stub dated February 14, 2011.

Cassandra Wray, claimant's daughter, testified that she and her husband are friends with Christopher Sampson and they talked with him about giving her father a job in the construction company in September 2010.

Mrs. Wray testified that sometime in the first part of February 2011, her father told her he fell on the job and was having pain in his lower back. When claimant could not get hold of "Sampson" to report his injury, Mrs. Wray took it upon herself to contact Chris Sampson to see if she could get her father some medical treatment. Chris Sampson told her he would get it done the next business day. But that never happened. After a period of no contact, she received a call from Chris Sampson about 6 weeks to 2 months before her deposition, which was taken June 6, 2011, in regard to claimant's filing a workers compensation claim through an attorney. Chris Sampson insisted claimant never fell and that no one ever contacted him about any fall. The two argued, and then Chris Sampson recalled the phone conversation where they talked about getting claimant to see a doctor. Mrs. Wray testified that Chris Sampson admitted he had not taken claimant to get any treatment.

John Wray, claimant's son-in-law, testified he arranged with Chris Sampson to give claimant a job in Sampson's construction business. At some point, Mr. Wray learned from his wife that claimant had fallen on the job and injured his low back. He testified that he and his wife made multiple attempts to arrange for claimant to see a doctor, but Chris Sampson never came through.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as

follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

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[3] K.S.A. 2010 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[9] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

ANALYSIS

Whether claimant suffered an accident at work on February 9, 2011,[10] and timely reported it to his employer depends upon which witnesses' testimony is believed. Claimant and his witnesses testified that he did, whereas respondent's witness, Mr. Sampson, testified that claimant did not. Mr. Sampson said claimant did not work on February 9, 2011, and did not report an accident or that his back injury was work-related. Mr. Sampson contends that the first he became aware claimant was alleging a work-related accident and injury was in late March 2011 when he received the written claim from claimant's attorney.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible.[11] Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the

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[9] K.S.A. 44-534a.

[10] Claimant testified that he was not certain of the date his accident happened but believed it was on a Wednesday in early February. He believed it was on or about February 9, 2011. P.H. Trans. at 12, 16.

[11] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

claimant and respondent's witness testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed his testimony over the testimony of respondent's witness. Deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*[12], appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[13]

This record presents a close question. Because preliminary benefits were awarded to claimant, the ALJ obviously found claimant's testimony to be more credible than that given by Mr. Sampson. After reading and considering their respective testimony, together with the deposition testimony given by these two witnesses and by Mr. and Mrs. Wray, this Board Member agrees with the ALJ that claimant presents the more credible description of events.

CONCLUSION

(1) Claimant suffered personal injury by accident on or about February 9, 2011, that arose out of and in the course of his employment with respondent.

(2) Claimant provided respondent with timely notice of his accident.

AWARD

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated June 21, 2011, is affirmed.

IT IS SO ORDERED.

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[12] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

[13] *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008).

Dated this _____ day of August, 2011.

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DUNCAN A. WHITTIER
BOARD MEMBER

c: Katie M. Black, Attorney for Claimant
Dale V. Slape, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge